THE COURT: Mr. Toledo, how old are you, sir?

THE DEFENDANT: 25.

THE COURT: Where are you from?

THE DEFENDANT: Michuoacan [sic], Mexico.

THE COURT: How much education do you have?

THE DEFENDANT: Elementary.

[13] THE COURT: Are you married?

THE DEFENDANT: Yes.

THE COURT: Do you have children?

THE DEFENDANT: Yes; two.

THE COURT: Where are they?

THE DEFENDANT: In Houston.

THE COURT: Born there?

THE DEFENDANT: Yes.

THE COURT: Where is your wife from?

THE DEFENDANT: Houston.

THE COURT: She's a U. S. citizen?

THE DEFENDANT: Yes.

THE COURT: How long were you living in Houston?

THE DEFENDANT: Fourteen weeks.

THE COURT: Did your family bring you over or what?

THE DEFENDANT: Yes.

THE COURT: How long have you been married?

THE DEFENDANT: Six years.

THE COURT: Did you ever try to get any papers to be here?

THE DEFENDANT: No.

THE COURT: What kind of work do you [14] do in Houston?

THE DEFENDANT: Gutters. For the rain.

THE COURT: You clean them or what?

THE DEFENDANT: No. We install them.

THE COURT: What's his story?

MR. RINKA: Judge, the defendant is a native and citizen of Mexico with no documents to enter or pass through or remain in the United States.

The defendant was apprehended by the U.S. Border Patrol on the 23rd of February of [sic] near the Benitez County fence line near the 16-mile marker of I-35 north of Laredo, Texas.

At the time he was arrested the defendant admitted that he had last entered the United States illegally from Mexico by wading the Rio Grande River near the World Trade Bridge on the 22nd of February of 2004 and he waded the river and entered the United States at a place

other than that designated by immigration officials as a port of entry.

The defendant was last convicted of illegal entry on the 17th of November of 2000 in [15] Del Rio, Texas.

THE COURT: Is that right? You have a conviction about three and a half years ago back in Del Rio for illegal entry?

THE DEFENDANT: Yes, sir.

THE COURT: And then you swam the river here in February?

THE DEFENDANT: Yes, sir.

THE COURT: Had you been in Mexico for a while or did you just go over to visit?

THE DEFENDANT: No.

THE COURT: You were coming out of Mexico in February; right?

THE DEFENDANT: Yes.

THE COURT: How long had you been in Mexico.

THE DEFENDANT: One week.

THE COURT: Why did you go there for a week?

THE DEFENDANT: Because they deported me to Mexico.

THE COURT: Oh, you had been kicked out after in the last – this year you were thrown out of the United States also?

THE DEFENDANT: Yes.

[16] THE COURT: Is that here in Laredo or somewhere else?

THE DEFENDANT: In Laredo.

THE COURT: You don't have that in your . . . ?

MR. RINKA: We've got just that when they picked him up in February, they ran a check and there was 15 prior illegal entries back and forth.

THE COURT: So even after his prior conviction?

MR. RINKA: Yes. I don't know the specific dates, but the last prior conviction that we know of is the 2000 conviction.

THE COURT: Okay. I'll accept the plea, Mr. Toledo. We'll get back to you as soon as we can. Do you have any questions?

THE DEFENDANT: No.

(The court continues with the other defendants.)

(End of proceedings.)

[17] [Court Reporter's Certificate Omitted In Printing]

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	L-04-546
VS	*	LAREDO, TEXAS
REYMUNDO TOLEDO-FLORES	*	SEPTEMBER 9, 2004

TRANSCRIPT OF REARRAIGNMENT
[sic: should be "SENTENCING"]

BEFORE THE HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

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* * *

[2] THE COURT: All right. Reymundo Toledo-Flores, 546.

Are you Reymundo Toledo-Flores?

DEFENDANT TOLEDO FLORES: Yes, sir.

THE COURT: I have to sentence you for illegally entering this country in February. And at the time you did that you were on probation for doing the same thing in the year 2000.

No. Wait a minute. That's not right. Is he – why did I write that down? What case is he on probation for?

PROBATION OFFICER: Case Number 500 –

THE COURT: Number what?

PROBATION OFFICER: 165, Your Honor.

THE COURT: Yeah, but what paragraph is it here?

PROBATION OFFICER: Paragraph 19, Your Honor.

THE COURT: Oh, there it is.

Okay. You were put on probation for five years in the year 2000. And that was here in Laredo. And so you were supposed to stay out of trouble until January of 2005, but instead you came back in – well, this latest time was in February of this year. You actually had come back before then, apparently, because you were in trouble again. You were – yeah, you didn't wait too [3] long, really.

You were – you were put on probation here in January of 2000 and by December – by October of 2000 you're already back in trouble again in Harris County for criminal mischief. And then you went out and got another illegal entry in Del Rio later in 2000. Then in 2001, you had an assault case in Harris County.

So you've – you've come and gone a lot even though you've been supposedly sent away. And then in 2002, you were in a drug case where you got sentenced to seven months confinement in Harris County. And even that didn't deter you. You were removed in November of '02 and were back again in November of '03 getting in some other brush with the law in Houston. And then '04, driving while intoxicated. So you've been coming in – in and out like a swinging door here for the last three or four years.

And you have a whole series of voluntary departures going back to 1988. You're the third one this morning that was charged, I won't say wrong, but, I mean, you were – you were charged with a lower offense than you should

have been charged with. You actually score – if you – if your lawyer read the report to you, you actually score at Line 13, Column 6, which means that you're supposed to get 33 to 41 months, but you're not [4] going to get that much. The worst you can get is 24 months, because of the way you were charged.

Anything you want to talk about before the sentence is imposed?

DEFENDANT TOLEDO-FLORES: Just forgive me for everything I've done. But everything I've done, I've paid for it in jail. To give me a fair amount of time so I can go back and be with my family.

THE COURT: Well, we'd love for you to go back and be with your family. The trouble is we can't keep you there. I mean, even leaving aside all your problems in Houston, this will be the third time you've been in a court – a federal court for immigration charges. And I'm sure each time you told the judge "This is it for me," and you were back again almost immediately.

You're just not getting the message. You're not getting the message that you don't belong here and you can't be here. And you better get the message, because you're only 25 years old and you've already – you're already in Column 6, and you're going to keep adding on to that. You've got a lot of years to keep adding on to that if you don't stop coming over here. I'm sure – I can guarantee you that the next time the prosecutors, or at least I hope, will not undercharge you. In which case, you know, you'll be getting close to five years in [5] prison. Anyway.

Anything else?

DEFENDANT TOLEDO-FLORES: That's all.

THE COURT: Anything else, Mr. Martinez?

MR. MARTINEZ: Your Honor, I filed two objections, both of them for preservation purposes only. One is the argument that's – we're hoping the Fifth Circuit will recognize that, that simple possession of a controlled substance is not an aggravated felony. And the other one is the Blakely, Almendarez-Torres objection, as well.

THE COURT: All right. Okay. The objections are overruled.

Anything else, Mr. Toledo?

DEFENDANT TOLEDO-FLORES: No, sir.

THE COURT: In the probation case, I'll revoke the probation and order you to serve six months. In this case, even though you score a lot higher, I'll sentence you to 24 months. That's a total of 30 months, because they're consecutive. That's the bad news.

I'll tell you the good news. The good news is that 30 months for the two cases combined is still less than the least you should have gotten, just in this case alone, had the Government charged you with what they should have charged you with. So you still came away [6] with a discount. That's number one.

Number two, you've already served seven months that you can subtract from that. So the – so when I revoked the probation and ordered you to serve six months, that part of the sentence you've already served. And you will be eligible for good time credits of 52 days a year. So, you know, you've got some time left, but not – probably not as much as it looks. The point is that we don't seem to be able to convince you to stay home.

So all I can tell you is that, when you get out, your file will stay open for a year. We call it supervised release, but we're not going to – we can't supervise you, but your file will be open for a year. If you come back in the first year, you will get some more time in this case. And, of course, you'll get new charges. Even if you wait a year, you'll always get new charges. Just – just like now, this is the third illegal entry charge you've got, and you'll always get new charges, because you don't have papers. And with this record, you're not ever going to get papers.

I'll waive the fine, but I do have to assess you $100.00 of cost. You can appeal to another court. It's free. You just have to say that you want to, but you have to say it either right now or in the next 10 days. [7] Otherwise, you lose the right to appeal.

Do you wish to appeal or not, or do you want to wait and think about it?

DEFENDANT TOLEDO-FLORES: No, it's fine.

THE COURT: All right. Well, if – you can change your mind as long as you do it within the next 10 days.

* * *

[8] [Court Reporter's Certificate Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378

Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-546-ALL

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 17, 2005]

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Reymundo Toledo-Flores (Toledo) appeals the two-year sentence imposed following his guilty-plea conviction for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

improper entry by an alien. Toledo argues that the district court erred by imposing the eight-level increase in U.S.S.G. § 2L1.2(b)(1)(C) (2003) for having a prior aggravated felony conviction. Toledo contends that his Texas state conviction for possession of cocaine is not a qualifying aggravated felony because it is not a felony under the federal Controlled Substances Act. Although Toledo conceded before the district court that this argument was foreclosed by *United States v. Rivera*, 265 F.3d 310 (5th Cir. 2001), and *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), on appeal he asserts that these decisions are not binding because they conflict with *Jerome v. United States*, 318 U.S. 101 (1943).

Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." *United States v. Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. *See United States v. Sanchez-Villalobos*, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meets this definition. *See* 21 U.S.C. § 844(a) (2003); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378

Conference Calendar

D.C. Docket No. 5:04-CR-546-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Laredo

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 17, 2005]

[FILED IN THE U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS-OCTOBER 5, 2005]

(JURAT OMITTED IN PRINTING)

Before BENAVIDES, CLEMENT and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: SEP 21 2005

SUPREME COURT OF THE UNITED STATES

No. 05-7664

Reymundo Toledo-Flores

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit, No. 04-41378.

ON CONSIDERATION of the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED by this Court that the said motion and the petition are granted[.] The petition for a writ of certiorari in No. 05-547, Lopez v. Gonzales, is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

April 3, 2006

(JURAT OMITTED IN PRINTING)